**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| WILDEARTH GUARDIANS et al.,<br><br>Plaintiffs,<br><br>v.<br><br>DEBRA HAALAND et al.,<br><br>Defendants,<br><br>and<br><br>AMERICAN PETROLEUM INSTITUTE et al.,<br><br>Intervenor–Defendants. | No. 1:21-cv-0175-RC |

**INTERVENOR–DEFENDANT ANSCHUTZ EXPLORATION CORPORATION'S OPPOSITION TO PLAINTIFFS' MOTION FOR VOLUNTARY DISMISSAL**

March 18, 2022

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## INTRODUCTION

Intervenor–Defendant Anschutz Exploration Corporation opposes Plaintiffs' motion to voluntarily dismiss this lawsuit (ECF No. 71) and the settlement agreement on which that motion is based (ECF No. 71-1). Were the Court to grant the motion, the lease-sale decisions that Plaintiffs challenge would return to the Bureau of Land Management for further National Environmental Policy Act analyses and decision-making. AEC opposes the motion for all of the reasons set out in the American Petroleum Institute's response (ECF No. 76), which AEC joins, plus two additional reasons.

First, even though this lawsuit directly affects the contractual and property rights of lessees such as AEC, Plaintiffs and Federal Defendants shut them out of the settlement process. None of the Intervenor–Defendants was allowed to participate in the settlement discussions that have now led to Plaintiffs' motion. Second, were the Court to grant the motion, that ruling would toss the oil-and-gas leasing decisions here into a precarious regulatory landscape. And that landscape recently became even more uncertain in the wake of the Western District of Louisiana's decision enjoining the Department of Interior from using a key Biden Administration metric for measuring the effects of climate change in NEPA analyses. To avoid all these pitfalls, and the ones API highlights in its response, the Court should deny Plaintiffs' motion to voluntarily dismiss and turn its attention to resolving API's long-pending motion to dismiss.

## BACKGROUND

This case involves Plaintiffs' NEPA challenges to 28 oil-and-gas lease sales. *See, e.g.*, Compl. ¶ 1 & tbl. A, ECF No. 13; Order Granting Federal Defendants' Motion for Voluntary Remand Without Vacatur, ECF No. 46. Substantiating its decision to hold the challenged lease

sales, BLM issued an Environmental Assessment and Finding of No Significant Impact for each sale. *See* API Mem. in Supp. of Motion to Dismiss in Part at 8–9, ECF No. 28-1.

Plaintiffs oppose the sales. In February 2021, Plaintiffs filed their complaint seeking "declaratory and injunctive relief against [Federal Defendants], challenging as arbitrary federal leasing authorizations encompassed in" the challenged lease sales. Am. Compl. ¶ 15. Among other things, Plaintiffs asked the Court to (1) "[d]eclare that Federal Defendants' leasing authorizations . . . violate NEPA," and (2) "[v]acate Federal Defendants' leasing authorizations," *id*. Requested Relief ¶¶ A–B.

In June 2021, API moved to dismiss Plaintiffs' claims as to 23 of the 28 leasing decisions, explaining that Plaintiffs failed to challenge those decisions within the applicable 90-day limitations period in § 226-2 of the Mineral Leasing Act, thus barring the claims they bring here. *See* Mot., ECF No. 28. That motion has been fully briefed since August 2021. *See* Reply, ECF No. 45. API has explained that the Court should resolve API's threshold challenge to Plaintiffs' claims before addressing Plaintiffs' and Federal Defendants' requests to stay or to remand the litigation. *See, e.g.*, API Resp., ECF No. 52; API Resp., ECF No. 54. It now takes the same position as to Plaintiffs' motion to voluntarily dismiss, a position that AEC joins in full.

Despite API's pending motion to dismiss, Plaintiffs and Federal Defendants worked for months toward, and recently finalized, their settlement agreement—an agreement between those parties only. They did so without involving any of the Intervenor–Defendants. They did so even though Intervenor–Defendants repeatedly asked to be included in those talks. And they did so even though Intervenor–Defendants explained that their exclusion created fundamental legal and equitable problems.

As set out below, those issues should undercut any confidence the Court might have in approving the settlement agreement and granting Plaintiffs' motion to voluntarily dismiss. The Court should also account for the practical implications of granting that motion. In practical effect, granting Plaintiffs' motion would amount to a voluntary remand to BLM for further NEPA review—the exact relief Plaintiffs have sought since the inception of this case, and relief that amounts to a breach by Federal Defendants of the terms of the lease agreements with lessees such as AEC. Plus, as API sets out in its response, such a remand leaves the leases, and the Intervenor–Defendants, in a state of perilous limbo. The federal government could effectively gut the value and even the existence of the leases, in which Intervenor–Defendants have contractual, property, and due-process rights. *See Mont. Wildlife Fed'n v. Haaland*, No. 20-35793, slip op. at 5 (9th Cir. Jan. 5, 2022) (per curiam) (stating that AEC "has a substantial due process interest in the outcome of this litigation by virtue of its contract with the federal government"), ECF No. 34-1. The federal government could do so on an unknown and unknowable timeline. To make matters worse, this voluntary remand would come at a time of profound regulatory uncertainty created by the recent preliminary injunction issued in *Louisiana v. Biden*, No. 2:21-cv-174-JDC-KK, 2022 WL 438313 (W.D. La. Feb. 11, 2022), *stayed pending appeal*, No. 22-30087 (5th Cir. Mar. 16, 2022) (per curiam), which has thrown public-lands leasing dependent on NEPA into chaos.

## ARGUMENT

### I. Voluntary dismissal would ignore the interests of the non-settling parties.

In addition to API's arguments, AEC also objects to the motion because the settling parties excluded AEC and the other Intervenor–Defendants from the negotiations leading to the settlement agreement. AEC's attorneys asked the settling parties more than once to participate.

Those requests were denied. Now a settlement has occurred, followed immediately by the motion for voluntary dismissal, neither of which accounts for AEC's nor the other Intervenor–Defendants' positions on settlement, which, among other things, would have highlighted the very prejudices API addresses.

By excluding AEC and the other Intervenor–Defendants from the negotiations, considerations, and activities that gave rise to the settlement, Plaintiffs and Federal Defendants defied settled federal law providing that all parties to a lawsuit should be privy to the settlement process, even if fewer than all of the parties attempt to settle. Like other parties, intervenors should be included in settlement discussions that occur between other parties to the lawsuit, and they can object if those parties attempt to settle the case in a manner that burdens the nonconsenting parties without their participation or approval. *See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986) ("[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement.").

Generally, intervenors who might be adversely affected by a settlement between a government entity (like Federal Defendants here) and a private party (like Plaintiffs here) should be provided with adequate notice of the proposed settlement and an opportunity to voice their positions on the settlement terms. *See, e.g., United States v. Comunidades Unidas Contra La Contaminacion (CUCCo )*, 204 F.3d 275, 278 (1st Cir. 2000). That did not occur here. Neither the Intervenor–Defendants, the Court, nor the public has been made aware of Plaintiffs' and Federal Defendants' intent with respect to the voluntary remand. The settling parties are thus concealing from the Court, the Intervenor–Defendants, and the public the true nature of their plans on remand—against the backdrop of repeated public comments by the federal government

in strong opposition to oil-and-gas leasing on public lands. Although Plaintiffs and Federal Defendants shared a draft of the settlement with the Intervenor–Defendants on the verge of filing it with the Court, the draft contained no specificity about the parties' plans on remand (much like the final settlement agreement), and Intervenor–Defendants were not given a seat at the settlement table to discuss the deal. The burden here was low: AEC and the other Intervenor–Defendants should have been included in the discussions leading to the final settlement. The penalty for not including them could include undoing any final settlement agreement. *See, e.g.*, *United States v. Carpenter*, 526 F.3d 1237, 1241 (9th Cir. 2008) ("Because the intervenors were not permitted to participate in the settlement review proceedings, the approval of the settlement must be vacated. The district court should not take any new action on the settlement before considering the contentions of the intervenors as well as the other parties.").

The Court may grant Plaintiffs' motion only on terms the Court considers proper. *See* Fed. R. Civ. P. 41(a)(2). And the Court must consider whether the dismissal would cause "legal prejudice." *In re Vitamins Antitrust Litig.*, 198 F.R.D. 296, 304 (D.D.C. 2000). That includes prejudice to Intervenor–Defendants. Indeed, "[t]he purpose of the provision authorizing the Court to dismiss a case 'on terms that the court considers proper' is to protect a defendant from any prejudice or inconvenience that may result from a plaintiff's premature dismissal." *Mittakarin v. InfoTran Sys., Inc.*, 279 F.R.D. 38, 41 (D.D.C. 2012) (citing *GAF Corp. v. Transamerica Ins. Co.*, 665 F.2d 364, 369 (D.C. Cir. 1981)).

The prejudice to AEC is real. Plaintiffs assert that "Intervenor API—with the support of the remaining Intervenors—has previously asked the Court to partially dismiss this case … further demonstrating that dismissal would not cause prejudice." Mot. at 2, ECF No. 71. That's disingenuous. As API details in its response, granting API's motion would result in dismissal of

Plaintiffs' claims, with prejudice, as time-barred—exactly the kind of early dismissal that Rule 12 is designed to effectuate. Plaintiffs' motion, on the other hand, does quite the opposite: it enshrines in the settlement a result that captures much—if not all—of what Plaintiffs would have won on their claims: remand to the BLM for more NEPA analysis. Granting API's motion would bring finality and clarity to 23 of the 28 challenged lease sales; granting Plaintiffs' motion would perpetuate uncertainty over those lease sales. The prejudice to lessees such as AEC stemming from that uncertainty is profound. The Court should protect Intervenor–Defendants from that consequence by first resolving API's motion to dismiss.

What's more, Federal Defendants could very well be seeking to shield themselves from potential liability for contractual breach of their lease agreements by hiding behind a settlement agreement that they hope will be approved by the Court. The standard language required by the BLM in leases at the time of those at issue here states:

> Rights granted are subject to applicable laws, the terms and conditions, and attached stipulations of this lease, the Secretary of the Interior's regulations and formal orders *in effect as of lease issuance*, and to regulations and formal orders hereafter promulgated *when not inconsistent with lease rights granted* or specific provisions of this lease.

*See, e.g.*, Bureau of Land Mgmt., U.S. Dep't of Interior, *Offer to Lease and Lease for Oil and Gas, Form 3100-11*, at 1 (Oct. 2008), available at https://www.blm.gov/sites/blm.gov/files/uploads/Services_National-Operations-Center_Eforms_Fluid-and-Solid-Minerals_3100-011.pdf (emphasis added). This language fixes the rights of the lessee, such as AEC, as of the date of lease issuance. Changes to the rights of the lessee—such as those that would result from further NEPA analysis conducted years after lease issuance—are clearly inconsistent with the lease rights granted by the BLM at the time of issuance. Such unilateral changes to the lessee's rights by the government after execution of the lease would amount to a

breach of contract. Plaintiffs and Federal Defendants, whose interests are now aligned, are using this final settlement agreement to potentially infringe on established contract rights protected by federal law. This would not only go against the public interest but also prejudice the very property rights AEC intervened to protect.

## II. Granting Plaintiffs' motion for voluntary dismissal would cast BLM's leasing decisions—and AEC's and others' leases—into a regulatory landscape with surging uncertainty.

The prejudice to the oil-and-gas lessees in the form of uncertainty, delay, and other impediments that a *de facto* remand of the lease sales to the BLM for further NEPA review would cause cannot be overstated. That prejudice will be magnified by the uncertainty caused by the Western District of Louisiana on February 11, 2022, when it preliminarily enjoined the Biden Administration from factoring the social cost of carbon into federal decisions on permitting, investment, projects, and regulation. *Louisiana*, 2022 WL 438313, at *21 (W.D. La. Feb. 11, 2022). Just two days ago, the Fifth Circuit stayed the district court's preliminary-injunction order pending appeal. *Louisiana v. Biden*, No. 22-30087, slip op. at 8 (5th Cir. Mar. 16, 2022) (per curiam). As a result, the Department of Interior and BLM will likely delay federal oil-and-gas lease sales until that litigation is resolved. Any NEPA decision-making going forward in this environment will be subject to profound uncertainty until that occurs. That includes the NEPA work that the BLM would perform in this case if the Court were to grant Plaintiffs' motion.

This is not mere speculation. In a declaration submitted in support of the government's motion to stay pending appeal in *Louisiana*, Dominic J. Mancini, Deputy Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget, an office within the Executive Office of the President, stated in plain terms the discord that the injunction creates for federal agencies charged with NEPA decisions. Mancini Decl. at 9–23, *Louisiana v.*

*Biden*, No. 2:21-cv-1074-JDC-KK (W.D. La. filed Feb. 19, 2022), ECF No. 104. He stated that the preliminary injunction has forced the Department of Interior to juggle multiple incompatible mandates and to discard environmental analyses and rulemakings in favor of do-overs. Mancini Decl. ¶ 16. Mancini also stated the BLM has in fact halted much of its oil-and-gas leasing and permitting work on federal lands. Mancini Decl. ¶ 22. Mancini stated that the injunction could prevent throngs of federal agencies from using the "best available science"—which includes the social cost of carbon—in its environmental analyses, which would force BLM to revise environmental reviews of oil-and-gas lease sales. Mancini Decl. ¶ 31. Add to that, he said, that federal scientists complying with the injunction may violate scientific-integrity policies prescribing the use of best-available scientific information. *Id.*

This is just the beginning, as the case begins to make its way through the appellate process. If the Court were to grant Plaintiffs' motion, it would be throwing the leasing decisions into the thick of this regulatory morass.

## CONCLUSION

For these reasons, and the reasons set out in API's response, the Court should deny Plaintiffs' motion for voluntary dismissal and instead first resolve API's motion to dismiss.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on March 18, 2022, I filed this document using the Court's CM/ECF system, which will serve the document on all counsel of record.

*/s/ Mark D. Gibson*
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